3-14-2014

Plane Family Trust v. Skinner Appellant's Brief Dckt. 41448

Case No. 41448-2013

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE JIM & MARYANN PLANE FAMILY TRUST DATED JULY 23, 2012;

Appellant - Plaintiff,

F.H. CARLTON and the F.H. CARLTON FAMILY TRUST,

Non-Appellant - Plaintiff,

vs.

JASON & JANAE SKINNER, husband and wife;

Respondent - Defendant,

DORAN E. SMITH and JUDY E. SMITH, husband and wife; KIM N. ERICKSON and CYNTHIA ERICKSON, husband and wife; and any and all persons claiming any interest in and to the subject real property located in Sec. 27, TS16S, R43E, Boise Meridian, Bear Lake County, State of Idaho,

Non-Respondents - Defendants.

Appellant's Opening Brief

On Appeal from *Judgment* filed January 10, 2014, and its associated *Memorandum Decision & Order on Plaintiff's Motion to Void a Portion of the Judgment and Decree of Quiet Title Filed August 22, 2000* filed August 13, 2013, and *Memorandum Decision and Order on Skinners' Request for Costs and Fees* filed January 8, 2014, from the District Court of the Sixth Judicial District for the State of Idaho, in and for Bear Lake County, Case Number CV-1998-0000121

The Honorable Mitchell W. Brown, District Judge

W. Alan Schroeder, Esq., ISB#4118
Brian D. Sheldon, Esq. ISB#9262
Schroeder & Lezamiz Law Offices, LLP
447 West Myrtle Street - P.O. Box 267
Boise, Idaho 83701-0267
Telephone: 208-384-1627
Telecopy: 208-384-1833
Email: alan@schroederlezamiz.com; brian@schroederlezamiz.com
the lawyers for The Jim & Maryann Plane Family Trust dated July 23, 2012
Appellant/Plaintiff

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STATEMENT OF THE CASE

I. Nature of the Case.

This is a case based on a simple error: a patent jurisdictional defect as to the location of an easement. This defect has been erroneously upheld and maintained by the District Court at various points for over a decade, exposing the Appellant – *The Jim & Maryann Plane Family Trust dated July 23, 2012* ("Plane Trust") – and others to civil liability while simultaneously impairing access to the Plane Trust's parcel. Should this defect be allowed to stand – as the now appealed District Court's January 10, 2014 Judgment, and associated August 13, 2013 Decision intends to do – the affected parcels will be bound by a partially illegal and wholly unworkable easement that does nothing to resolve the civil liability and impaired access suffered by the Plane Trust and others. However, a favorable resolution by this Court will finally remove this black cloud from the easement, making it both practically viable and legally valid.

The jurisdictional defect arose when several landowners signed a Stipulation in 2000 to settle a Quiet Title Action. In a separate paragraph, the Stipulation "granted [] an easement of approximately ten (10) feet in width for egress and ingress [] on the west border of said properties." This grant would have been simple enough, but unfortunately, the landowners took the additional step of providing that part of the ten feet of the easement may be located upon the State of Idaho's right-of-way as an alternative to

providing the ten feet wholly across private land. The landowners and their successors-in-interest thereafter used the easement for many years, using the alternative part located upon the State's right-of-way and some of the private land, as opposed to the part solely located upon the west border of the private land.

Twelve years later, in 2012, the State became aware of the encroachment by said easement upon the State's right-of-way. The State demanded that the encroachment be abated, as being an "illegal encroachment."

The new landowner of the dominant estate, the Plane Trust, soon learned of the State's demand and acted to resolve the "illegal encroachment." The Trust coordinated with the new landowner of the servient estate, the Respondent – *Jason & Janae Skinner* ("Skinner") – about abating the "illegal encroachment," as well as abating Skinner's own interference with the easement. Specifically, the Trust sought to secure the "ten (10) feet in width for egress and ingress [] on the west border" of the servient estate because the State right-of-way was never legally available for any part of the easement. The coordination was to no avail. This lack of resolution left the Trust and the location of its easement in a black cloud.

On April 1, 2013, having no other option, the Plane Trust sought a remedy in the District Court to resolve the cloud that was upon the Trust's easement. The Trust filed a Motion under Rule 60(b)(4) of the Idaho Rules of Civil Procedure, seeking to void a

portion of the 2000 Judgment (which simply followed the 2000 Stipulation) as related to the 2000 Judgment's reliance upon a portion of the State's right-of-way as providing for a portion of the location of the easement. The 60(b)(4) motion was necessary because the previous landowners had no authority to sign the 2000 Stipulation (or to otherwise sign a contract) to grant an easement upon the State's right-of-way when the State was not a party to the 2000 Stipulation and was not otherwise aware of the Stipulation (as described on pages 11-13 *infra*).

On August 13, 2013, the District Court issued a Decision which denied the Plane Trust's 60(b)(4) motion, as well as awarded fees and costs to Skinner.

On September 20, 2013, the Plane Trust appealed the District Court's August 13 Decision to the Idaho Supreme Court.

On October 24, 2013, this Court conditionally dismissed the appeal. However, after receiving briefing from the parties, the Court withdrew its conditional dismissal and ordered the Plane Trust's appeal to be reinstated. *See Order to Withdraw Order Dated October 24, 2013 and Reinstate Appellate Proceedings*, Docket No. 41448-2013 (12-3-2013).

In the meantime, on January 8, 2014, the District Court issued its Memorandum Decision and Order on Skinners' Request for Costs and Fees.

On January 10, 2014, the District Court issued its Judgment, as related to its August 13, 2013 Decision and January 8, 2014 Decision.

On January 31, 2014, the Plane Trust appealed, via an amended appeal, the District Court's January 10 Judgment and associated August 13 Decision and associated January 8 Decision to the Idaho Supreme Court. *See also* the Plane Trust's second amended appeal filed on February 7, 2014.

II. Course of Proceedings.

On November 5, 1998, a Complaint for Quiet Title was filed. R. Vol. I, pp. 20-29. The Complaint was filed by Plaintiff MacVicar (owners of what is now known as Parcel #3) and by Plaintiff Carlton (owner of what is now known as Parcel #4) against Defendant Wallentine (owner of what is now known as Parcel #2), Defendant Everton (owner of what is now known as Parcel #1), and other Defendants. *Id.* The State of Idaho was not a named party.

On March 12, 1999, an Amended Complaint for Quiet Title was filed by the same Plaintiffs against the same Defendants. *Id.* at 69-84. Again, the State of Idaho was not a named-party. In Count Two of this Amended Complaint, MacVicar alleged a claim for an easement across Parcels #1 and #2 under various theories. *Id.* at 74. Thereafter, Answers, Counterclaims, and Cross Claims were filed, wherein at least Wallentine and

Everton denied MacVicar's claim for an easement across Parcels #1 and #2. R. Vol. I, pp. 92, 127, 137, 147.

In lieu of litigation, the landowners settled. On May 26, 2000, the parties signed a "Stipulation for Settlement" ("2000 Stipulation"). *Id.* at 159-162. The State of Idaho neither signed nor consented to the 2000 Stipulation.

On June 2, 2000, the District Court signed an "Order Approving Stipulation for Settlement" ("2000 Order"). *Id.* at 163-165.

On August 21, 2000, the District Court signed a "Judgment and Decree for Quiet Title" ("2000 Judgment"). *Id.* at 166-173. The 2000 Judgment "granted" to the owner of Parcel #3 (and their heirs, assigns and successor's in interest) an easement across Parcels #1 and #2. *Id.* at 168. The State of Idaho likewise did not consent to the 2000 Judgment.

On October 5, 2005, James K. & Maryann Plane purchased Parcel #3. *Id.* at 187. Sometime thereafter, Skinner purchased Parcels #1 and #2. *Id.*

On or about September 27, 2012, the Plane Trust discovered that Skinner was impairing the easement generally. *Id.* at 190; *see also* R. Supp., p. 34, 36-38 *and* R. Vol. II, p. 315. The Plane Trust also learned that the Idaho Transportation Department ("ITD") sent a letter to Skinner dated September 27, 2012, stating that the "frontage road" (i.e. the easement in question) was illegally encroaching on the State's right-of-way. R. Vol. I,

pp. 189-190, 220; *see also id.* at 238 (another letter from ITD dated January 9, 2013, ratifying the previous ITD letter dated September 27, 2012).

Immediately thereafter, the Plane Trust attempted to resolve the impairment and the "illegal encroachment" with Skinner, but to no avail. R. Vol. I, p. 190.

On January 7, 2013, the Plane Trust filed a Motion in the District Court to substitute itself for its predecessor-in-interest as to Parcel #3, i.e. MacVicar. *Id.* at 174-177.

On February 19, 2013, Skinner filed a Motion in the District Court to substitute themselves for their predecessors-in-interests as to Parcel #1, i.e. Everton, and as to Parcel #2, i.e. Wallentine. R. Vol. II, pp. 240-242.

Before February 27, 2013, the Plane Trust coordinated with all of the parties, including Skinner, a stipulation to substitute certain parties, as applied for by the Trust on January 7, 2013, and as applied for by Skinner on February 19, 2013. Thereafter, on February 27, 2013, the Trust filed such stipulation with the District Court. *Id.* at 243-251.

On February 27, 2013, an "Order Approving Stipulation" was signed granting the Motions to substitute filed by the Plane Trust and by Skinner. *Id.* at 252-255.

On or before April 1, 2013, the Plane Trust or the lawyer for the Trust coordinated with all the remaining and new parties, including the State of Idaho, about stipulating to void the offending portion of the easement in the 2000 Judgment. All parties – including

the State – agreed to this stipulation with the sole exception of Skinner. R. Vol. II, p. 262.

Due to Skinner's objection, on April 1, 2013, the Plane Trust filed a Motion to Void a Portion of the 2000 Judgment pursuant to Rule 60(b)(4) of the Idaho Rules of Civil Procedure. *Id.* at 256-259; *see also* R. Vol. I, pp. 227, 257 (describing the portion of the easement sought to be voided).

After briefing and oral argument, on August 13, 2013, the District Court denied the 60(b)(4) Motion and granted Skinner costs and fees. R. Vol. II, pp. 393-400.

On September 20, 2013, the Plane Trust appealed the District Court's August 13 Decision to the Idaho Supreme Court. *Id.* at 426-432.

On January 8, 2014, the District Court issued its Memorandum Decision and Order on Skinners' Request or Costs and Fees. R. Supp., pp. 42-57.

On January 10, 2014, the District Court issued its Judgment. *Id.* at 58-59.

On January 31, 2014, the Plane Trust appealed, via an amended appeal, the District Court's January 10 Judgment and associated August 13 Decision and associated January 8 Decision to the Idaho Supreme Court. *Id.* at 64-71.

On February 7, 2014, the Plane Trust appealed, via a second amended appeal, the District Court's January 10 Judgment and associated August 13 Decision and associated January 8 Decision to the Idaho Supreme Court. *See Order Granting Appellant's Motion*

to Augment filed February 19, 2014 (authorizing the augmentation of the record with the Plane Trust's second amended appeal).

III. Statement of Facts.

The "Judgment and Decree for Quiet Title" issued on August 21, 2000 ("2000 Judgment") resolved a boundary dispute between the parties that owned what is legally described as, Parcels #1, #2, #3, #4 of Lot 1 of Section 27 of Township 16 South, Range 43 East, Boise Meridian, Bear Lake County, State of Idaho. R. Vol. I, pp. 27, 186-187, 199-202. The owners of Parcels #1, #2, #3, #4 in 2000 were as follows: Parcel #1: Everton; Parcel #2: Wallentine; Parcel #3: MacVicar; and Parcel #4: Carlton. *Id.* at 186-187.

Several decades before, Parcels #1, #2, #3, and #4 were all owned in common by the Erickson family and were subsequently subdivided among a series of mesne conveyances to the predecessors-in-interest of the Plane Trust and Skinner. *See id.* at 71-72, 95-97. Notably, the Plane Trust's predecessors-in-interest, the MacVicars, asserted an easement by implication owing to the previous common ownership of all four parcels during the litigation surrounding the 2000 Judgment. *Id.* at 74; *see Davis v. Peacock*, 991 P.2d 362, 367, 133 Idaho 637, 642 (1999) (describing the three-part common law test for easements implied by prior use). The easement asserted by the Plane Trust's predecessors-in-interest in Count Two of its Amended Complaint was never ruled on by

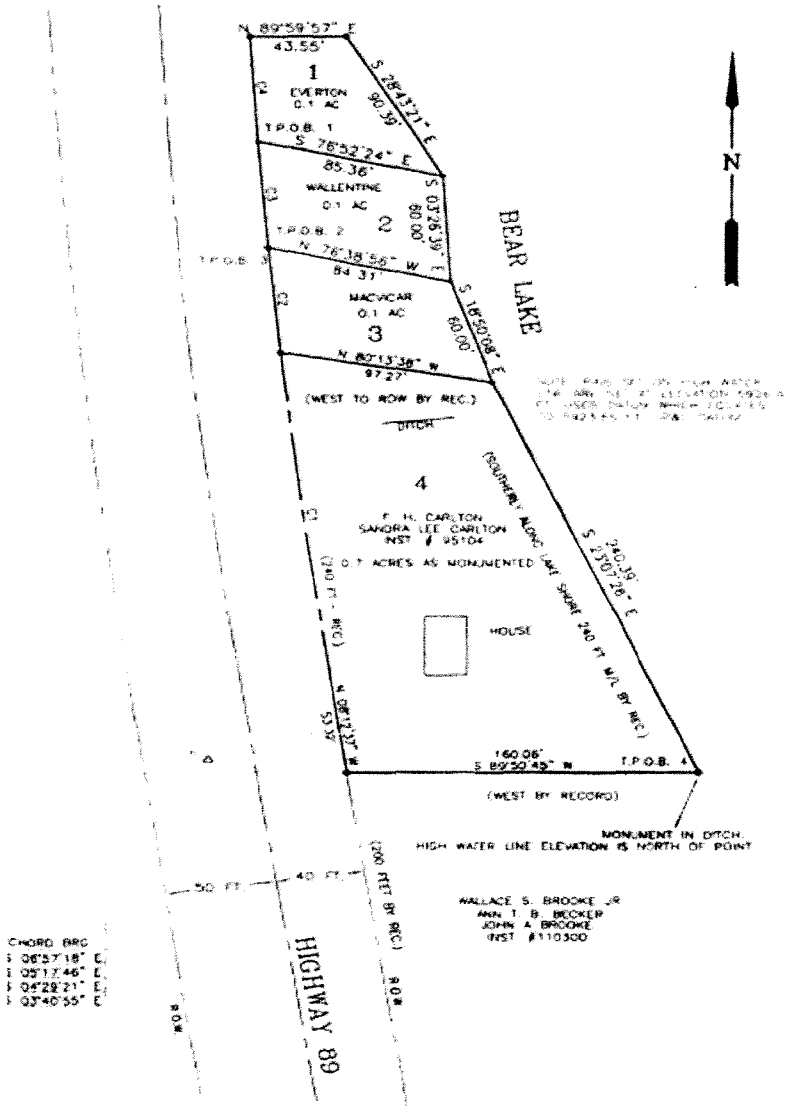
the District Court since the 2000 Judgment instead ratified the settlement reached among the parties in the 2000 Stipulation. *See* R. Vol. I, p. 74 (asserting an easement "by reasons of prescription, implication, necessity, or after acquired title").

Instead of ruling directly on the various bases of the easement claimed by the Plane Trust's predecessors-in-interest, the 2000 Judgment simply recognized an easement described in the settlement process manifested by the 2000 Stipulation. To that end, beyond resolving a boundary dispute, the 2000 Judgment "granted" to the owner of Parcel #3 an "easement" across Parcels #1 and #2 for "egress and ingress" to Parcel #3. *Id.* at p. 188. The "easement" portion of the 2000 Judgment stated:

> 5. There is granted to Jeanne Macvicar, by Annette and Sterling Wallentine, and Peggy and David Everton, their heirs, assigns and successor's in interest, an easement of approximately ten (10) feet in width for egress and ingress to their property, said easement being located on the west border of said properties. The easement shall not exceed its present width where it adjoins the Everton property. No more five feet of the Wallentine property shall be used as part of the easement, and only that portion of the Wallentine property as necessary to provide ten (10) feet in width shall be used. the state right of way line. It is understood that the existing right-of-way leading from the State right of way to the Everton, Wallentine and Macvicar properties may be located, in part, upon the State right-of-way as historically has been so used. .The Macvicars, Wallentines and Evertons shall jointly maintain said easement sufficient for ingress and egress and shall not block or infringe upon the other's access, said maintenance agreement to be binding upon the heirs, assigns and successor's in interest of Macvicars, Wallentines, and Evertons.

Id. at 188, 197.

As is revealed in reading the "easement," the easement portion of the 2000 Judgment included a reference to a "State right of way" and some typographical mistakes. As to the reference to the "State right of way," this related to a right of way deed dated September 23, 1935, R. Vol. I., pp.188-189, 217-218, which was illustrated on the survey from which the 2000 Judgment was based, as follows:



See R. Vol. I, p. 28 *and* R. Vol. II, pp. 271-275. As to the typographical mistakes, this related to certain language mistakes in the 2000 Judgment which were corrected in the 2000 Stipulation but not carried forward (for unexplained reasons) in the 2000 Judgment, as follows:

> 6. There is granted to Jeanne Macvicar, Joy Annette and Sterling Wallentine, and Peggy and David Everton, their heirs, assigns and successor's in interest, an easement of approximately ten (10) feet in width for egress and ingress to their property, said easement being located on the west border of said properties. The easement shall not exceed its present width where it adjoins the Everton property. No more than five feet of the Wallentine property shall be used as part of the easement, and only that portion of the Wallentine property as necessary to provide ten (10) feet in width shall be used. [redacted]. It is understood that the existing right-of-way leading from the State right of way to the Everton, Wallentine and Macvicar properties may be located, in part, upon the State right-of-way as historically has been so used. .The Macvicars, Wallentines and Evertons shall jointly maintain said easement sufficient for ingress and egress and shall not block or infringe upon the other's access, said maintenance agreement to be binding upon the heirs, assigns and successor's in interest of Macvicars, Wallentines, and Evertons.

R. Vol. I, pp. 161, 206.[1]

At and before the time the 2000 Judgment was issued, the State of Idaho – as represented through the ITD – was not a party to the litigation or otherwise

[1] The Court should note that the easement was *not* described on the survey map which the 2000 Judgment was based on.

knew/consented to the 2000 Judgment. *See* R. Vol. I, pp. 189-190 (letter from ITD to the Plane Trust dated September 27, 2012, that "It has come to our attention that ..."); *see also id.* at 230 (letter from ITD to Alan Schroeder stating that ITD "is not a party to the above captioned matter").

After the 2000 Judgment was issued, the then owners of Parcels #1, #2, #3 conveyed their interests to others. Specifically, as to Parcel #1, Everton conveyed their interest to Skinner; as to Parcel #2, Wallentine conveyed their interest to Skinner; and as to Parcel #3, MacVicar conveyed their interest to Jim and Cindy McLaughlin, who subsequently conveyed their interest in Parcel #3 to James Keith & Maryann Plane, who then conveyed their interest in Parcel #3 to the Plane Trust. *Id.* at 186-187. Thus, the current owner of Parcels #1 and #2 is Skinner, and the current owner of Parcel #3 is the Plane Trust. *Id.* at 187.

Over 12 years after the 2000 Judgment was issued, ITD discovered the "illegal encroachment" upon the State's right-of-way by the "easement" which was the subject of the 2000 Judgment. *Id.* at 189-190, 217-218. ITD wrote the now owners of Parcels #1 and #2, i.e. Skinner, on September 27, 2012, demanding that Skinner "immediately" remove the road that encroached upon the State right-of-way. *Id.* at 220. Specifically, the ITD letter dated September 27, 2012, stated that:

> It has come to our attention that you have built a frontage road on ITD property at a building site at 252 Highway 89,

> Fish Haven, Idaho. *This encroachment is illegal* and must be removed. All lateral access must be from your private property and shall not be on State property.
>
> Please remove the *illegal encroachment* (frontage road) immediately. If the *illegal encroachment* has not been removed by you by October 15th, 2012, it will be removed by state forces and you will be billed for the expense."

R. Vol. I, p. 220 (emphasis supplied); *see also id.* at 230 (letter from ITD dated January 9, 2013, ratifying the previous ITD letter date September 27, 2012).

Upon learning of ITD's September 27, 2012 letter, as well as being privy to Skinner's general impairment of the easement, a representative of the Plane Trust verbally communicated with Skinner, as well as through a lawyer, *id.* at 222-223, to abate the impairment and the "illegal encroachment," as well as to secure the 10-foot road "easement" which was granted in the 2000 Judgment. *Id.* at 189-191. This communication was to no avail. *Id.*

Given Skinner's lack of response, the Plane Trust found itself in a predicament: the 2000 Judgment purportedly granted the parties an easement to use part of the State's right-of-way, but ITD pointed out that any such use of the State's right-of-way constituted an "illegal encroachment." To resolve this untenable situation, the Plane Trust intervened in the lawsuit amongst the various successors-in-interest to the parcels affected by ITD's determination. A judicial remedy was necessary because in the

absence of any cooperation from Skinner there was no other way to address the unlawful provision in the 2000 Judgment mentioned above. *Id.* at 190-191, 225-228; *see also* R. Supp., pp. 34, 36-38 (affidavits describing Skinners' continued interference with easement access) *and* R. Vol. II, p. 315 (affidavit from Skinner diagramming only an 8 foot area for Plane's ingress and egress).

Based thereon, on April 1, 2013, the Plane Trust filed a Motion to Void a Portion of the 2000 Judgment pursuant to Rule 60(b)(4) of the Idaho Rules of Civil Procedure, as follows:

> 5. There is granted to Jeanne Macvicar, by Annette and Sterling Wallentine, and Peggy and David Everton, their heirs, assigns and successor's in interest, an easement of approximately ten (10) feet in width for egress and ingress to their property, said easement being located on the west border of said properties. ~~The easement shall not exceed its present width where it adjoins the Everton property. No more five feet of the Wallentine property shall be used as part of the easement, and only that portion of the Wallentine property as necessary to provide ten (10) feet in width shall be used, the state right of way line. It is understood that the existing right-of-way leading from the State right of way to the Everton, Wallentine and Macvicar properties may be located, in part, upon the State right-of-way as historically has been so used~~. The Macvicars, Wallentines and Evertons shall jointly maintain said easement sufficient for ingress and egress and shall not block or infringe upon the other's access, said maintenance agreement to be binding upon the heirs, assigns and successor's in interest of Macvicars, Wallentines, and Evertons.

R. Vol. I, p. 227. By reducing paragraph 5 in this manner, the Plane Trust's 60(b)(4) motion would preserve the language expressly granting an easement for ingress and egress on the west border of Parcels #1 and #2, but would make clear that this easement would be located solely on the private land. This clarification would therefore remove the illegal "option" of straddling the location of the easement across a mixture of private land and State right-of-way that was strangely and invalidly provided for by the parties' predecessors-in-interest, as well as by Skinner. *See* R. Vol. II, p. 315 (affidavit from Skinner diagramming only an 8 foot area for Plane's ingress and egress, of which part is to be on the State right-of-way).

ISSUES PRESENTED ON APPEAL

1. Under basic common law and statutory principles of property law, did the District Court err in disposing of the State's right-of-way when paragraph 5 of the 2000 Judgment was jurisdictionally deficient?
2. Under basic principles of contract interpretation, did the District Court err when it ordered the wholesale enforcement of a partially illegal contract and when it ignored the plain language of the 2000 Stipulation?
3. Under a court's duty to assess the legality of any contract *sua sponte*, did the District Court err in refusing to modify the 2000 Stipulation, whether in whole or in part, when this duty required the Court to modify the underlying easement to the extent that it was partially valid?
4. Under I.C. § 12-121 and Idaho R. Civ. Pro. 54(e), did the District Court abuse its discretion in awarding Skinner fees when the Court made no findings to support its decision and when the Plane Trust brought a legitimate claim and behaved reasonably throughout the litigation?

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5. Under I.C. § 12-121 and I.A.R. 54(a), is the Plane Trust entitled to attorney fees both on appeal and below when Skinner's position throughout the litigation has been frivolous, unreasonable, and without foundation?

STANDARD OF REVIEW

While most claims brought under Rule 60(b) of the Idaho Rules of Civil Procedure are reviewed only for an abuse of discretion, a motion based on a void judgment under Rule 60(b)(4) is reviewed de novo. *Meyer v. Meyer*, 135 Idaho 460, 462, 19 P.3d 774, 776 (Ct. App. 2001) (contrary to other 60(b) motions, "relief from a void judgment pursuant to Rule 60(b)(4) is nondiscretionary."); *compare Dufur v. Nampa & Meridian Irr. Dist.*, 128 Idaho 319, 324, 912 P.2d 687, 692 (Ct. App. 1996) (using an abuse of discretion standard of review for 60(b)(4) motions) *with Dragotoiu v. Dragotoiu*, 133 Idaho 644, 648, 991 P.2d 369, 373 n.2 (Ct. App. 1998) (specifically rejecting *Dufur* and establishing a de novo standard of review for 60(b)(4) motions).

Under contract principles, the determination of whether a particular contract (including stipulations) is illegal is a question of law and is reviewed de novo. *Farrell v. Whiteman*, 146 Idaho 604, 608, 200 P.3d 1153, 1157 (2009); *see also Trees v. Kersey,* 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). Moreover, the question of illegality may be raised at any stage in the litigation. *Id.*

A trial court's award of attorney fees under the narrow statutory authorization of Idaho Code § 12-121 and Idaho R. Civ. Pro. 54(e)(1) is reviewed for an abuse of

discretion. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003) (citing *O'Boskey v. First Fed. Sav. & Loan Ass'n of Boise*, 112 Idaho 1002, 1008, 739 P.2d 301, 307 (1987)).

ARGUMENT

This appeal is built on three successive and interrelated errors committed by the District Court. First, the District Court erred because it had no jurisdiction to enter a portion of paragraph 5 of the 2000 Judgment. Second, the District Court compounded this error in 2013 by affirming the jurisdictionally defective portion of paragraph 5 of the 2000 Judgment.[2] Third, the District Court further confused the issue by awarding

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[2] In Skinner's filings before the District Court, Skinner attempted to mischaracterize the Plane Trust's claim that the District Court lacked jurisdiction to enter a portion of paragraph 5 of the 2000 Judgment in two ways – both of which this Court notably rejected. *See Order Re: Appealability* filed 10/24/2013; *Order to Withdraw Order dated October 24, 2013 and Reinstate Appellate Proceedings* filed 12/3/2013.

First, Skinner attempted to mischaracterize the Plane Trust's 60(b)(4) motion as untimely. *Skinner's Response to Idaho Supreme Court's "Order re: Appealability" Entered Oct. 24, 2013 dated November 14, 2013* ("Skinner's Response") at 6. However, Skinner's claim ignored this Court's holding that any judgment rendered by "a court without jurisdiction is void, and void judgments may be attacked *at any time*." *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003). R. Vol. II, pp. 352-354. *See also Plane Trust's Response dated November 12, 2013 to Idaho Supreme Court's Order of Conditional Dismissal dated October 24, 2013* ("*November 12, 2013 Response*") at 13-15.

Second, Skinner attempted to mischaracterize the Plane Trust's claim about the jurisdictional defect of a portion of paragraph 5 of the 2000 Judgment as a claim that the State of Idaho was an "indispensable party" under the rules of joinder in Idaho R. Civ. Pro. 19. *Skinner's Response* at 4-6. However, as described in the Plane Trust's responsive briefing, these references to the rules of joinder are an oversimplification, if not a red herring. *See* R. Vol. II, p. 354; *see also November 12, 2013 Response* at 24-28. The Plane Trust never cited to Rule 19 as the basis for the jurisdictional defect contained in the 2000 Judgment. *Id.* at 27. Instead, the State should have been part of this litigation to the extent that the original parties to the 2000

Skinner attorney fees as part of the 2013 Decision and the related 2014 Decision. As demonstrated below, the Court should untangle this string of errors by reversing the District Court's latest decisions in favor of the Plane Trust.

I. The District Court lacked jurisdiction to dispose of the State's right-of-way in paragraph 5 of the 2000 Judgment because doing so violated both common law and statutory principles of property law.

The District Court had no jurisdiction to formally approve all of paragraph 6 of the 2000 Stipulation in paragraph 5 of the 2000 Judgment because in so doing the District Court exercised a power denied to it by both the common law and the Idaho legislature. First, and most basically, the common law rule of *nemo dat quod non habet* prohibited the parties' predecessors-in-interest from giving away the property rights of a third party (i.e., the State of Idaho's right-of-way). Second, the attempt of the parties' predecessors-in-interest to unwittingly divest the State of its property rights bypassed the mandatory administrative system for managing the State's highway system set forth in the Idaho Code. Accordingly, the District Court had no valid means of approving paragraph 6 of the 2000 Stipulation in paragraph 5 of 2000 Judgment.

A. The 2000 Judgment is unenforceable because it violates basic common law principles of property law.

The District Court erroneously denied the Plane Trust's Rule 60(b)(4) motion to void a portion of paragraph 5 of the 2000 Judgment because the rendering court had no

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Stipulation should have used ITD's administrative process to establish their purported private easement over a portion of the State's right-of-way. *Id.* at 24-25, 28-30.

jurisdiction over the illegal attempt of the private parties to divest the State of Idaho of its property rights.

It is black letter law that "no one can convey what he does not own." *See generally* Charles Harpum, et al., *The Law of Real Property* 86 (8th ed., 2012) (explaining the fundamental common law principle of *nemo dat quod non habet*). Title 40 of the Idaho Code makes plain that the ownership and regulatory authority over all State rights-of-way is vested exclusively in the Idaho Transportation Department, and not private parties nor the judiciary. *See e.g.,* I.C. § 40-117(9) (defining public right-of-way as "a right-of-way open to the public and under the jurisdiction of a public highway agency," which may include "fee simple title"). As such, the original contracting parties (the predecessors-in-interest to the appellant and respondent and other private parties) had no authority to create a private easement over State-held property in paragraph 6 of the 2000 Stipulation. Moreover, the District Court lacked personal and subject matter jurisdiction to formally approve this inherently invalid transfer in paragraph 5 of the 2000 Judgment. This violation of hornbook law prompted both regulatory action by ITD (once the agency discovered the illegal encroachment announced in the 2000 Stipulation and in the 2000 Judgment) as well as the instant litigation to void the illegal portions of the easement. R. Vol. I, pp. 189-190.

Accordingly, the District Court erred in denying the Plane Trust's 60(b)(4) motion because that court had no jurisdiction to ratify the illegal provisions of the paragraph 6 of 2000 Stipulation in paragraph 5 of the 2000 Judgment.

B. The 2000 Judgment is unenforceable because Title 40 of the Idaho Code specifically denied the District Court jurisdiction over the subject matter of the 2000 Stipulation.

In addition to the common law basis described above, there is a statutory foundation for the jurisdictional defect in paragraph 5 of the 2000 Judgment. Specifically, Title 40 of the Idaho Code grants exclusive regulatory authority over State rights-of-way to ITD. *See* I.C. § 40-201 ("the duty is hereby imposed by the state [] to improve and maintain the highways within [its] respective jurisdiction as hereafter defined"); *see also* I.C. §§ 40-310(1), 501. Within each highway district, "the power and jurisdiction of the highway district shall be inclusive" of all associated highways and rights-of-way. *Id.* at § 40-1311; *see also id.* at § 40-202(1)(a) ("[t]he board of county or highway district commissioners shall cause a map to be prepared showing the general location of each highway and public right-of-way in its jurisdiction"). Thus, the concept of exclusive jurisdiction is clear even in the Legislature's definition of State right-of-way as "a right-

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of-way open to the public and under the jurisdiction of a public highway agency." *Id.* at § 40-117(9).[3]

Against this backdrop of exclusive jurisdiction, the Idaho Code also makes clear that any attempt to increase or diminish the State's control over highways and rights-of-way within its jurisdiction must first be brought administratively via abandonment or validation proceedings pursuant to I.C. §§ 40-203 and 203A. Moreover, judicial review of any such attempt to alter the State's control of its highways and associated rights-of-way is available only after ITD has rendered a final decision on the matter:

> If proceedings pursuant to the provisions of section 40-203 or 40-203A, Idaho Code, are initiated, those proceedings and any appeal or remand therefrom shall provide the exclusive basis for determining the status [] of the highway, and *no court shall have jurisdiction* to determine the status [] of said highway *except by way of judicial review* provided for in this section.

I.C. § 40-208(7) (emphasis added). This is in keeping with the well-established common law rule that a citizen cannot adversely possess a public right-of-way owned by the State of Idaho. *See Meservey v. Gulliford*, 14 Idaho 133, 93 P. 780 (1908); *Hanson v. Proffer*, 23 Idaho 704, 132 P. 573 (1913).

Here, there was no judicial review of any agency action. The State of Idaho was never a party to the instant litigation nor did ITD play any role in (or have any knowledge

[3] By way of example, this clear legislative mandate is what authorized ITD to place a power pole within the State's right-of-way, as well as within the disputed easement area. *See* R. Supp., pp. 34, 36-38 *and* R. Vol. II, p. 315.

of) the original easement until more than a decade after its creation. R. Vol. I, pp. 186-190. In effect, a portion of paragraph 6 of the 2000 Stipulation amounted to a self-declared abandonment of the impacted State right-of-way – but as ITD made plain to the parties, circumventing I.C. § 40-203 in such a manner creates nothing but an "'illegal encroachment" that must be removed. As such, the District Court had no authority to enter all of paragraph 5 of the 2000 Judgment because judicial review was not available for the illegal portions of the 2000 Stipulation. Instead of valid judicial review, there was only invalid judicial confirmation of a similarly invalid attempt of the parties' predecessors-in-interest to regulate the State's right-of-way in place of ITD.[4] The offending portion in paragraph 6 of the 2000 Stipulation was therefore invalid insofar as it bypassed the mandatory administrative process generally outlined in Title 40 of the Idaho Code, and the related portion in paragraph 5 of the 2000 Judgment was erroneous insofar as it ignored I.C. § 40-208(7) in particular.

Consequently, the failure to include the State of Idaho in this statutory context deprived the District Court of jurisdiction because both the 2000 Stipulation and 2000

[4] Notably, the District Court even recognized its earlier error in the August 13, 2013 Decision. *See* R. Vol. II, p. 395 n.7. But notwithstanding its frank admission of the illegality of the offending language, the District Court nonetheless ordered it enforced. *See* Section II.A *infra*.

Judgment completely disregarded the administrative process required by the Idaho Legislature.[5]

II. The District Court's August 13, 2013 Decision should be reversed because it is legally and factually erroneous.

Given that the District Court lacked jurisdiction to render the original paragraph 5 of the 2000 Judgment, the District Court compounded its error 13 years later by ordering the enforcement of this partially illegal contract. Specifically, the District Court's August 13, 2013 Decision was legally erroneous because it both ordered the wholesale enforcement of an illegal contract and also refused to sever the illegal provisions from the otherwise valid 2000 Stipulation and 2000 Judgment.[6] In addition, the District Court's August 13, 2013 decision was factually erroneous because it ignored the plain language of paragraph 6 of the 2000 Stipulation.

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[5] In Skinner's filings before the District Court, Skinner attempted to distract from this jurisdictional defect by obtaining -- after the 60(b)(4) motion was filed -- a permit from ITD to use the State's right-of-way for part of the easement. R. Vol. II, p. 300. However, as the Plane Trust explained to the District Court -- to which the District Court must have agreed since it did not comment upon Skinner's attempt in its 2013 Decision -- the permit did nothing to solve the problem motivating the Trust's 60(b)(4) motion. *See id.* at 354-355. In contrast with the easement, the permit is only a license and does not run with Trust's title. ITD remains free to revoke or modify the permit, *id.* at p. 304, which means that the permit therefore does nothing to clarify the jurisdictional error in a paragraph 5 of the 2000 Judgment and continues to leave the cloud on the location of the easement granted to provide ingress and egress to Parcel #3. In addition, the permit therefore serves as confirmation that any portion of the easement location on State right-of-way was illegal.

[6] "A stipulation is a contract and its enforceability is determined by contract principles." *Maroun v. Wyreless Sys., Inc.,* 141 Idaho 604, 611, 114 P.3d 974, 981 (2005).

A. The District Court's decision is legally erroneous because it contradicts at least two basic principles of contract law.

The District Court's August 13, 2013 order was legally erroneous for two interrelated reasons: first, the District Court erred by ordering the enforcement of a contract that is partly illegal; second, the District Court erred by refusing to void the illegal portion of the 2000 Judgment.

A contract is unenforceable to the extent that it is illegal, be that in whole or in part. *Farrell v. Whiteman*, 146 Idaho 604, 608, 200 P.3d 1153, 1157 (2009) (citing *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445 (2004)). Notably, even on appeal, a court "has *the duty* to raise the issue of illegality *sua sponte*." *Id.* (emphasis added). This duty arises from the long-standing refusal of courts to render "judicial aid to either party to an illegal contract." *Id.* at 609, 1158 (citing *McShane v. Quillin,* 47 Idaho 542, 547, 277 P. 554, 559 (1929) ("No principle in law [] is better settled than that which, with certain exceptions, refuses redress to either party to an illegal contract.")). A court will therefore deem a contract to be illegal if it "rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy," *regardless of the ignorance or intentions of the contracting parties. Id.* (citing *Quiring v. Quiring,* 130 Idaho 560, 566, 944 P.2d 695, 701 (1997) (emphasis added); *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 565, 261 P.3d 829, 842 (2011).

If only part of a contract is illegal, then the illegal provisions should be severed and the valid, legal provisions retained. *See generally* 17A C.J.S. Contracts § 378. Courts in Idaho have long recognized that when a contract contains "both benign and offensive components and the different portions are severable, the unobjectionable parts are generally enforceable." *Farrell v. Whiteman*, 146 Idaho 604, 611, 200 P.3d 1153, 1160 (2009) (citing *Nelson v. Armstrong,* 99 Idaho 422, 426, 582 P.2d 1100, 1104 (1978)). The concept of severability is premised on giving the fullest effect to the intentions of the contracting parties as legally possible. *Durant v. Snyder*, 65 Idaho 678, 694, 151 P.2d 776, 783 (Idaho 1944); *see also Hill v. Schultz*, 71 Idaho 145, 227 P.2d 586 (1951) (holding that the illegal portions of a contract should be severed "if no necessity exists for reliance upon illegal provisions therein").

In this case, paragraph 6 of the 2000 Stipulation is partially illegal; as such, the illegal provisions should be severed and the legal provisions retained. As discussed above, paragraph 6 of the 2000 Stipulation was partially illegal because it attempted to divest the State of Idaho of its property rights. Title 40 of the Idaho Code gives the ITD broad authority to regulate and control the State rights-of-way, and the agency clearly indicated that the purported five-foot right of way outside of Skinner's Parcels #1 and #2 were an "illegal encroachment" and had to be removed. R. Vol. I, p. 190. None of the parties contest the illegal nature of the encroachment. *Id.* at 257-258. Moreover, the

District Court even recognized the partial illegality of the 2000 Stipulation, even though it refused to provide any remedy and, inexplicably, ordered it to be enforced. *See* R. Vol. II, p. 395 n.7 (noting that "the easement outlined in the [2000] Stipulation and [2000] Judgment *includes property which was admittedly on the state of Idaho's right-of-way*") (emphasis added).

In addition, although paragraph 6 of the 2000 Stipulation is thus partially illegal, its illegal provisions should be severed. While the ultimate goal of the paragraph 6 of 2000 Stipulation was to grant an easement of "approximately 10 feet" for ingress and express to the Plane Trust's predecessors-in-interest, the contract provided (admittedly strangely) two options for accomplishing this goal: either the ten foot easement could be provided solely across the private land of the servient estate (i.e. Parcels #1 and #2), or the ten foot easement could be provided by a combination of private land of the servient estate and the adjoining state right-of-way. *Id.* at 188. Since the latter option is illegal, the former option of providing the ten foot easement solely across the private land of the servient estate is the independent means to accomplish the original parties' intent.

Consequently, the District Court's Decision was legally erroneous because it ordered the wholesale enforcement of a partially illegal contract and because it refused to sever the illegal provisions of paragraph 5 of the 2000 Judgment.

B. The District Court's decision is factually erroneous because it ignored the plain language of paragraph 6 the 2000 Stipulation.

In addition to the legal errors discussed above, the District Court's August 13, 2013 Decision is also factually erroneous. Specifically, the District Court erroneously stated that the location of the easement granted in paragraph 6 of the 2000 Stipulation "**would be** 'located, in part, upon the State right-of-way as [it] historically has been so used.'" R. Vol. II, p. 396 (emphasis supplied). However, the plain language of paragraph 5 of the 2000 Judgment and paragraph 6 of the 2000 Stipulation did not say "**would be**", but only "**may be**," thus allowing the parties the option of the not relying on State right-of-way at all. *See* R. Vol. I, pp. 168, 188.

The terms of an unambiguous contract must be given their plain meaning in order to give effect to the intention of the contracting parties. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004) (citing *Opportunity, L.L.C. v. Ossewarde,* 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002)). In this regard, it is notable that the plain meaning of the word "may" has always been understood to represent "[a]n auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency." Black's Law Dictionary (4th ed. 1968) (citing *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 411 (1914)). Although the term may have a different meaning in the context of interpreting a *statute*, the typical layperson is generally understood to equate "may" with "possibility."

Black's Law Dictionary (9th ed. 2009). Therefore, when giving effect to the intent of private parties to a contract rather than a legislature enacting a statute, the ordinary meaning of the term "may" controls.

In this case, there is a critical difference between "would be" and "may be." The significance of the difference goes to the fact that the Plane Trust was not seeking in its Rule 60(b)(4) motion to "surgically" change anything about the grant in the easement, the scope of the easement, or the location of the easement, as the Decision stated at R. Vol. II, pp. 397-398. The parties agreed in paragraph 6 of the 2000 Stipulation that:

> It is understood that the existing right-of-way leading from the State right of way to the Everton, Wallentine and MacVicar properties **may be located, in part, upon the State right-of-way as historically has been so used.**

R. Vol. I, pp. 168, 188 (emphasis added). In other words, the parties never agreed that any of the easement "**would be**" located in the State right-of-way, as erroneously stated by the District Court's Decision, but only that the easement "**may be**" located in the State right-of-way. To the extent that any reliance upon State right-of-way is legally (i.e., contractually) void, as should be the case as discussed above in Section I, Skinner's obligation remains the same and unchanged to provide to the Plane Trust "an easement of approximately 10 feet in width for egress and ingress [] on the west border" of Parcels #1 and #2, as stated in the first sentence as well as in the third sentence, in the easement. *Id.* at 188. The Plane Trust's 60(b)(4) motion merely sought to validate Skinner's existing

obligation to provide the Trust the approximately 10 feet on the west border of Parcels #1 and #2; given that the State right-of-way is legally not available to provide any part of the easement under Rule 60(b)(4); and, given Skinner was interfering with the easement area as explained in the Plane Affidavit. *See* R. Vol. I, pp. 190-191. *See also* R. Supp., pp. 34, 36-38 *and* R. Vol. II, p. 315. Accordingly, the District Court's August 13 Decision was factually erroneous because it ignored the plain language of paragraph 6 of the 2000 Stipulation and paragraph 5 of the 2000 Judgment.

III. The District Court erred in not voiding paragraph 5 of the 2000 Judgment, whether in whole or in part, because its duty to assess the legality of the underlying easement required the court to modify the easement to the extent that it was partially valid.

The District Court repeatedly professed that it had no authority to modify the terms of paragraph 5 of the 2000 Judgment as requested in the Plane Trust's 60(b)(4) motion to partially void the illegal portions of the original easement. R. Vol. II, p. 398; R. Supp., p. 50. This is simply not true. It is well established that a court may modify the terms of a contract where law or equity so demands. *See e.g., Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100 (2005) (holding that a court may modify a covenant not to compete in some situations). The Idaho Supreme Court has also consistently and explicitly held that "a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute [] is void." *Porter v. Canyon County Farmers' Mutual Fire Insurance Co.*, 45 Idaho 522, 525

(1928). This, in turn, gives rise to every court's duty to address the issue of illegality *sua sponte* and to subsequently sever any illegal contract terms as described in Section II.A above. *See Farrell v. Whiteman*, 146 Idaho 604, 608-611, 200 P.3d 1153, 1157-1160 (2009). Thus, given the statutory violation engendered by the original easement's encroachment on the State's right-of-way – a violation, moreover, that was demonstrated by ITD and recognized by all parties (including Skinner) – the District Court not only had authority to void the illegal portions of the original easement, but in fact had a positive duty to do so.

In shirking this duty, the District Court also refused to examine the legality of the entire easement:

> Because Plane Trust has limited its motion to requesting that only a portion of the [2000] Judgment be declared void, the issue concerning whether [paragraph 5 of the 2000] Judgment is void in its entirety is not properly before this Court, and therefore, this Court's Memorandum Decision and Order does not purport to determine whether the [2000] Judgment is void in its entirety.

R. Vol. II, p. 398 n. 8. The District Court's refusal to even consider the validity of the entire easement within paragraph 5 of the 2000 Judgment was erroneous because a court's *sua sponte* duty to address the legality of a contract takes a totality of the circumstances approach. *See Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002) ("Whether a contract is illegal is a question of law for the court to determine from *all* the facts and circumstances of each case") (emphasis added). Moreover, even though the

Plane Trust only sought to void a portion of paragraph 5 of the 2000 Judgment, the Trust did not foreclose the possibility that the entire easement was void *ab initio* owing to its indefinite location. *See* R. Vol. II, pp. 355-356. On the contrary, while only voiding a portion of paragraph 5 of the 2000 Judgment under Idaho R. Civ. Pro. 60(b)(4) is by far the simplest solution to this problem, the Plane Trust would recognize an alternative – though unnecessarily roundabout – remedy of actually litigating the easement for the reasons set forth in Count Two of the Amended Complaint originally filed by its predecessors-in-interest. R. Vol. I, p. 74 (asserting an easement "by reasons of prescription, implication, necessity or after acquired title").

The District Court's failure to even consider whether paragraph 5 of the 2000 Judgment was illegal in its entirety was therefore contrary to this Court's precedent and also arbitrarily denied the Plane Trust a legitimate form of relief.[7] Accordingly, should

[7] In addition, it cannot be argued that the District Court's failure to partially modify paragraph 5 of the 2000 Judgment as requested by the Plane Trust – or simply to void the entire judgment – was harmless error. The Idaho Rules of Civil Procedure provide that:

> [N]o error or defect in any ruling or order [] is ground for [] vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Idaho R. Civ. Pro. 61. Here, the District Court's failure to void the illegal portions of paragraph 5 of the 2000 Judgment was indeed inconsistent with substantial justice because it ordered the enforcement of a contract that was at least partially illegal. Similarly, ordering the wholesale enforcement of the 2000 Judgment severely and adversely affected the substantial property rights

this Court determine on appeal that paragraph 5 of the 2000 Judgment was wholly invalid, it should remand the case to the District Court to consider the relief originally requested in Count Two of the Amended Complaint by the Plane Trust's predecessors-in-interest.

IV. Skinner is not entitled to attorney fees either on appeal or below.

Skinner is not entitled to attorney fees in this present appeal, nor was Skinner entitled to attorney fees at the District Court level. As an initial matter, because the Plane Trust has a legitimate claim, it should prevail on appeal and thereby negate the basis for awarding attorney fees to Skinner. However, even if the Trust is not successful in this appeal, this Court should nonetheless reverse the District Court's award of attorney fees for at least two additional reasons. First, the District Court failed to make findings under Idaho Rule of Civil Procedure 54(e) to justify its exercise of discretion in awarding attorney fees to Skinner. Second, the District Court abused its discretion in awarding attorney fees to Skinner because the Trust brought a legitimate claim and behaved reasonably throughout the entire suit.

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of the Plane Trust and Skinner alike – the existence of an easement with an indefinite location permanently impairs the use and enjoyment of each party's parcel.

A. Skinner is not entitled to attorney fees because the Plane Trust should prevail on appeal.

Attorney fees may be awarded only to a "prevailing party" under I.C. § 12-121. Since Skinner should not prevail on this appeal, it necessarily follows that Skinner is not entitled to attorney fees since it will no longer be a prevailing party should this Court reverse the District Court's August 13, 2013 Decision. *See Magleby v. Garn*, 154 Idaho 194, 296 P.3d 400 n.5 (2013).

B. The District Court violated Idaho R. Civ. Pro. 54(e) because it did not make findings in awarding Skinner fees.

The District Court abused its discretion in awarding Skinner attorney fees because it failed to make the requisite findings justifying this extreme sanction. Even where a court has a legitimate basis for awarding attorney fees, this punishment is justified only when the court makes findings based on the record.

Idaho R. Civ. Pro. 54(e)(1) states that attorney fees awarded under I.C. § 12-121 "may be awarded by the court *only* when it finds, *from the facts presented to it*, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." (emphasis added). Similarly, Idaho Rule of Civil Procedure 54(e)(2) states that in awarding attorney fees under I.C. § 12-121, a court "shall make a written finding, either in the award or in a separate document, as to the basis and reasons for awarding such attorney fees." As a result, this Court has made clear that "[a]lthough an award of

attorney fees under the statute is discretionary, the award must be supported by findings, and those findings, in turn, must be supported by the record." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003) (citing *Wait v. Leavell Cattle, Inc.,* 136 Idaho 792, 41 P.3d 220 (2001)).

Here, although the District Court produced a separate decision (dated January 8, 2014) regarding the basis for awarding Skinner attorney fees, this decision is too vague and conclusory to constitute actual "findings" as per Rule 54(e) and this Court's precedent. After describing the requisite legal standard, the District Court simply states that:

> The Court has considered all the factors set forth in [Idaho R. Civ. Pro.] 54(e)(3), and specifically subparagraphs (A), (B), (C), (D), (F), (G), and (L). The remaining factors were considered but either did not appear to have application to this case or there was not information concerning the same in the record.

R. Supp., p. 53. But beyond simply stating the various factors outlined in Rule 54(e)(3), the District Court did not provide any basis or reasons for awarding attorney fees. While it contains lengthy references to the black letter law governing the award of attorney fees, the District Court spends no more than the two sentences quoted above actually applying these standards to the case at hand. The District Court even admits that "it is not the intent of the Court to go through and itemize, entry by entry, how the Court reached this

determination," but deems it sufficient to state that "the Skinners' claimed fees are generally reasonable." R. Supp., 53-54.

The closest the District Court comes to providing findings to justify its exercise of discretion in awarding Skinner attorney fees is to simply reiterate the erroneous legal conclusions it reached in the August 13, 2013 Decision. In the 2013 Decision, the District Court rejected the Plane Trust's 60(b)(4) motion to partially void paragraph 5 of the 2000 Judgment, concluding in short order – without citing any authority for its position – that "[e]ither the Judgment is void in its entirety, or it is not." R. Vol. II, pp. 397-98. Based on its unsupported all-or-nothing approach to contract validity, the District Court then concluded in a single sentence that it "further determines that Plane Trust's Motion to Void Judgment was brought and pursued frivolously, unreasonably and without foundation." R. Vol. II, p. 399 (citing I.C. § 12-121).

In its subsequent "findings" issued on January 8, 2014, the District Court reiterated its conclusion that it is "unaware of any legal theory of law [sic] that would allow this Court to surgically modify [the 2000] Judgment in the manner request by Plane Trust." R. Supp., p. 50. But as discussed at length above in Section II.A, the District Court's all-or-nothing approach to contract validity is patently incorrect. It is a basic principle of contract law that the illegal portions of a contract may be severed and the otherwise valid remainder enforced. *See Farrell v. Whiteman*, 146 Idaho 604, 608, 200

P.3d 1153, 1157 (2009). Moreover, the District Court explicitly recognized the illegal nature of the original parties' attempt to create a private easement over the State's right-of-way, yet refused to grant the Plane Trust its remedy or to exercise its own *sua sponte* duty to sever the illegal portions of this contract as void. R. Vol. II, p. 395.[8] This admission reveals how deeply flawed the District Court's analysis was because this Court has consistently and explicitly held that a contract is unenforceable to the extent that it is illegal. *See Id.* at 611, 1160.

Being thus armed with this Court's clear and binding precedent, it is absurd to conclude, as the District Court did, that "the position asserted [by the Plane Trust] was so 'plainly fallacious' that it should not have been pursued." R. Supp., p. 50. On the contrary, the purported finding proffered by the District Court does nothing more than compound the error of its original August 13, 2013 Decision. Accordingly, Skinner is not entitled to attorney fees because the District Court did not make the requisite findings supporting the exercise of its discretion.

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[8] *See also* R. Vol. II, p. 395 n.7 (wherein the District Court states "[t]he Court utilizes the term 'purported' because the easement outlined in the [2000] Stipulation and [2000] Judgment includes property which was admittedly on the state of Idaho's right-of-way. However, the state of Idaho was not a party to this proceeding.")

C. The District Court abused its discretion in granting Skinner attorney fees because the Plane Trust brought a legitimate controversy and behaved reasonably throughout the entire course of litigation.

Even if the District Court was correct to rule in Skinner's favor, the District Court nonetheless abused its discretion by awarding Skinner attorney fees. On appeal, a District Court's award of attorney fees under I.C. § 12-121 requires the reviewing court to determine:

> (1) whether the trial court properly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason.

Wait v. Leavell Cattle, Inc., 136 Idaho 792, 41 P.3d 220 (2001) (citing *Conley v. Whittlesey*, 133 Idaho 265, 985 P.2d 1127 (1999)). Here, the District Court correctly determined that awarding attorney fees to Skinner was an exercise of its discretion. However, the District Court overstepped the boundaries of its discretion and acted unreasonably in granting these fees. As demonstrated below, the District Court abused its discretion because the decision to award fees has no rational basis.

The award of attorney fees under I.C. § 12-121 is an extraordinary penalty that is appropriate only in exceptional circumstances. As this Court noted:

> An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation.

McGrew, 139 Idaho 551, 562, 82 P.3d 883 (2003) (citing *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings,* 135 Idaho 518, 20 P.3d 702 (2001)). Moreover, in exercising this discretion, "the entire course of the litigation must be taken into account" by the court. *Id.*

In the context of easement disputes, this Court had the recent opportunity to consider what constituted a frivolous, unreasonable, or foundationless case in *Ross v. Dorsey*, 154 Idaho 836, 303 P.3d 195 (2013). In that case, several successors-in-interest disputed whether the original party that subdivided a larger lakeside parcel intended to preserve access to a strip of beachfront in common to all parcels by way of an easement. *Id.* at 197-199. While admitting that the subdivision plat was ambiguous, the Supreme Court held that a subsequent deed conveying one of the parcels in question manifested the grantor's intent to reserve a common beachfront access to all the subdivided parcels. *Ross*, 303 P.3d at 200-202. Crucially, despite concluding that the Defendant-Appellants case was "weak," this did not entitle *either* party to attorney fees because "their case was not altogether without foundation." *Id.* at 204. Thus, even cases with a weak foundation are not deserving of the sanction of attorney fees under I.C. § 12-121 provided there is at least some legitimate controversy. *Id.*

Here, such a legitimate controversy exists, so Skinner is not entitled to attorney fees. Whereas *Ross* dealt with an easement subsequently asserted to exist within an

ambiguous subdivision plat, this case deals with an unambiguous but partially illegal attempt to locate a portion of an easement between two adjoining parcels upon the State's right-of-way. The argument in *Ross* was considered weak because a subsequent deed dispelled the appellant's strained interpretation of the original ambiguous subdivision plat. Here, however, the Plane Trust's argument is strong – rather than offering a strained interpretation of an ambiguous document, the Plane Trust is simply pointing out a patently illegal term and requesting an obvious remedy. Moreover, there is no question here that the attempt to create an easement partially over State right-of-way is illegal – the substantive basis for this appeal is that the District Court decided that an admittedly partially illegal contract should be nonetheless wholly enforced. Consequently, if the appellants in *Ross* brought a weak case but were nonetheless not deserving of the sanction of attorney fees, then the Plane Trust is certainly not deserving of such a sanction because its underlying claim is strong. Even if successful on appeal, Skinner is thus not entitled to attorney fees because the Trust initiated this litigation based on a legitimate controversy and presented a strong argument.

In addition, looking at the entire course of the litigation, it is clear that the Plane Trust behaved reasonably and truly only looked to litigation as a last resort. In particular, the Court should take special note of: (1) the Trust's attempt to talk to and coordinate a resolution with Skinner *before* filing any action in this Court, which Skinner does not

deny (R. Vol. I, pp. 190-191); (2) the Trust obtained party status before filing its original 60(b)(4) Motion; and (3) the Trust successfully coordinated an agreement as to its 60(b)(4) Motion with all of the other Plaintiffs and Defendants, including ITD, before filing its 60(b)(4) Motion. All parties, including ITD, implicitly agreed that the Trust's 60(b)(4) Motion was reasonable because all of them – save Skinner – agreed that the 60(b)(4) Motion should be granted. *See* R. Vol. II, p. 277.

Accordingly, the District Court abused its discretion in awarding Skinner attorney fees because the Plane Trust presented a legitimate controversy and behaved reasonably throughout the entire course of the litigation.

V. The Plane Trust is entitled to attorney fees both on appeal and below because Skinner's position throughout this entire litigation has been frivolous, unreasonable, and without foundation.

Given the significant resources it expended litigating what should be uncontestable points of law and fact, the Plane Trust requests attorney fees both on appeal and below.

A. The Plane Trust is entitled to attorney fees on appeal.

Under I.A.R. 41(a) and I.C. § 12-121, a party is entitled to attorney fees and costs on appeal if the appellate court "is left with an abiding belief that the appeal has been brought *or defended* frivolously, unreasonably, or without foundation." *Karlson v. Harris*, 140 Idaho 561, 569, 97 P.3d 428, 437 (2004) (emphasis added). With appeals concerning a question of law, an appellant is entitled to attorney fees "if the law is well settled" on that issue. *Stanley v. McDaniel*, 134 Idaho 630, 633, 7 P.3d 1107, 1110

(2000). As to questions of fact, an appellant must do more than just "invite the appellate court to second-guess the trial court on conflicting evidence." *Davis v. Gage*, 109 Idaho 1029, 1031, 712 P.2d 730, 732 (Ct. App. 1985).

Here, the Plane Trust has shown that the District Court's holdings in the 2000 Judgment, the August 13, 2013 Decision, and the January 8, 2014 Decision contradicted well settled issues of law and ignored the undisputed evidence in this case. Paragraph 5 of the 2000 Judgment violated the basic common law principle of *nemo dat quod non habet* and bypassed the mandatory administrative system established by Title 40 of the Idaho Code. The August 2013 Decision contradicted the fundamental principle that contracts are unenforceable to the extent that they are illegal, and that the illegal portions of a contract should be severed and the otherwise valid portions retained. The 2013 Decision also ignored the plain language of the easement, and the District Court shirked its duty to address the legality of the underlying contract, whether in whole or in part. Finally, the January 2014 Decision awarded Skinner attorney fees without making the requisite findings under Idaho R. Civ. Pro. 54(e) and in spite of the fact that the Plane Trust brought a legitimate claim and has consistently behaved reasonably throughout the entire litigation as per I.C. § 12-121.

Attorney fees are therefore an appropriate sanction on appeal because this entire course of litigation would not have been necessary had basic principles of hornbook law

held sway and had the Plane Trust not been penalized for attempting to protect their valid legal rights.

B. This case should be remanded because the District Court erred in not awarding attorney fees to the Plane Trust.

In light of the preponderance of legal authority backing the Plane Trust's claim demonstrated above, the Plane Trust was entitled to attorney fees under I.C. § 12-121 at the trial court level as well as on appeal. This Court should therefore remand the issue of attorney fees back to the District Court to enter judgment in the Plane Trust's favor as to the award of fees before the trial court. *See Stanley v. McDaniel*, 134 Idaho 630, 7 P.3d 1107 (2000); *Magleby v. Garn*, 154 Idaho 194, 296 P.3d 400 (2013); *see also McPherson v. McPherson*, 112 Idaho 402, 732 P.2d 371 (Ct. App. 1987) (awarding fees on appeal under I.C. § 12-121 and remanding to district court to determine fees below under I.C. §32-704).

ATTORNEY FEES

Given the manifest weakness of both the District Court's various decisions and Skinner's position throughout this entire litigation, this Court should award the Plane Trust attorney fees pursuant to I.A.R. 41(a) and I.C. § 12-121. Section V.A of the Argument section describes the particular basis for awarding the Plane Trust attorney fees on appeal. *Bouten Const. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 768, 992 P.2d 751,

763 (1999) ("A party must make argument in the argument section of its brief to receive attorney fees on appeal. I.A.R. 35(a)(6).")

CONCLUSION

The foregoing argument demonstrates that the District Court's 2000 Judgment, the August 13, 2013 Decision, and the January 8, 2014 Decision were legally and factually erroneous for a multitude of reasons. The Plane Trust therefore respectfully requests that this Court: void the offending portion of paragraph 5 of the 2000 Judgment; reverse the 2013 Decision; reverse the 2014 Decision; grant the Plane Trust attorney fees and costs on appeal; and remand this case to the District Court to also grant the Plane Trust's attorney fees and costs before the trial court. Alternatively, should this Court determine that paragraph 5 of the 2000 Judgment was *wholly* invalid, it should remand the case to the District Court to consider the relief originally requested in Count Two of the Amended Complaint by the Plane Trust's predecessors-in-interest and otherwise reverse the 2013 Decision, reverse the 2014 Decision, grant the Plane Trust attorney fees and costs on appeal, and remand this case to the District Court to also grant the Plane Trust's attorney fees and costs before the trial court.

Dated this 14th day of March, 2014.

SCHROEDER & LEZAMIZ LAW OFFICES, LLP

By _____ By _____

W. Alan Schroeder, Esq. Brian D. Sheldon, Esq.

The Jim & Maryann Plane Family Trust dated July 23, 2012, Appellant-Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2014, I served two (2) true and correct copies of the foregoing document via first class mail by the U.S. Postal Service, upon each of the following:

Scott J. Smith, Esq.
RACINE OLSON NYE BUDGE & BAILEY, CHARTERED
201 East Center Street
P.O. Box 1391
Pocatello, Idaho 83204

Frank Carlton
573 K. Street
Salt Lake City, Utah 84103

Lee Carlton
8781 South 1275 East
Sandy, Utah 84094

Ardee Helem, Jr.
841 Maple Drive
Fish Haven, Idaho 83287

Doran E. Smith and Judy E. Smith
65 E 1st S
Bloomington, Idaho 83223

Kim N. Erickson and Cynthia Erickson
261 Highway 89
Fish Haven, Idaho 83287

Idaho Attorney General's Office
Transportation Division
3311 West State Street
Boise, Idaho 83703

Elaine Anderson